Assessment Year 1992-93

IN THE HIGH COURT OF UTTARANCHAL AT NAINITAL

Income Tax Appeal No. 23 of 2002

The Commissioner of Income Tax,
Dehradun and another ..... Appellants

Versus

Reading & Bates Exploration Co.,
As agent of Mr. J. Malia,
C/o Arthur Anderson & Co.,
426, World Trade Centre,
Barakhamba Lane, New Delhi .....Respondent

Mr. S.K. Posti, learned counsel for the Tax Department.
Ms. Krishi Shukla, learned counsel for the respondent.

Date: 20.07.2004

Hon'ble P.C. Verma, A.C.J.
Hon'ble P.C. Pant, J.

1. This is an appeal under section 260A of the Income Tax Act, 1961 filed by the Revenue against the judgment and order dated 23.02.2001 passed by the Income Tax Appellate Tribunal, New Delhi in I.T.A. Nos. 7434/Del/1995.

2. Mr. J. Malia, respondent is a non-resident foreign technician employed by a foreign company, Reading and Bates Exploration Company which, in the year under consideration, executed contracts in India. During the year consideration, respondent was in employment of this company and thus derived income from 'salaries' from it.

3. The questions raised before us are as follows:-

QUESTIONS:

1. Whether on the facts and in the circumstances of the case, the Ld. ITAT was legally justified in holding that

the salary paid to the assessee for the off period outside India was not chargeable to Indian Income Tax Act in terms of section 9(1)(ii) of the I.T. Act, 1961, whereas the Ld. ITAT has itself held, vide order dated 25.3.1992 in ITA No. 5649/D/92, dated 28.7.99 in ITA No. 1079/D/91, dated 24.1.2000 in ITA No. 411/D/93 and dated 15.5.2000 in ITA No. 1648/D/94 that off period salary is taxable in India?

2. Whether on the facts and in the circumstances of the case, the ITAT was legally correct in holding that free boarding and lodging facilities provided by the employer at the rig in high seas cannot be construed to be perquisite?

3. Whether on the facts and in the circumstances of the case, the Ld. ITAT was justified in law in allowing the appeal of the assessee on the issue of charging interest u/s 234B of the I.T. Act while admitting that charging of interest u/s 234B is consequential?"

4. Heard learned counsel for the parties and perused the record.

5. As this Court has discussed in Income Tax Act Appeal No. 57 of 2002; The Commissioner of Income Tax, Dehradun & anther V/s SEDCO Forex International Drilling Co. Ltd. decided on 9th of Oct 2003 the reasoning regarding question No. 1 is given in the following paragraphs:

6. Section 4 of the Act is a charging section. It imposes tax on the total income of the previous year of every person. Under section 4(2), tax is deducted at source or paid in advance, where it is so deductible or payable. Section 5(2), on the other hand, restricts the scope of total income of a non-resident to the income which is received or deemed to be received in India or

which accrues or which is deemed to have accrued to him during such year.

7. Section 9(1)(ii) interalia lays down that income which falls under the head "Salaries", if it is earned in India, shall be deemed to have accrued to the non-resident during such year. Therefore section 9 is a deeming section. It brings in certain types of incomes, which may not come u/s 5, into the definition of "Total Income" u/s 2(45). Section 9(1)(ii) read with Explanation provides for an artificial place of accrual for income taxable under the head "Salaries". It enacts that income chargeable under the head "Salaries" is deemed to accrue in India if it is earned in India i.e. if the services under the contract for employment is rendered in India. In such a case, the place of receipt or actual accrual of salary is immaterial. In this case we are concerned with application of law to the facts of this case.

8. It is well settled that in order to ascertain the intention of the contracting parties one has to study the terms and conditions of the contract and in appropriate case one has to see the surrounding circumstances including the conduct of the parties. In this cases the contract provides for ON period and Off periods. The contract is for two years. It refers to Alternating Time Schedule. It covers both the periods. The Off period follows the ON periods. Therefore both the periods form an integral part of the contract. It is not possible to give separate tax treatments to On periods and Off period salaries. It is argued that period following ON period was not a rest period. We do not find any merit. After 35/28 days of hard work, the technician had to go back to the country of his residence. The Off period followed the ON period. They both formed part of an Integral scheme. That even under the Finance Act of 1999 the new explanation uses the term "Rest period/Leave period". For above reasons we find merit in the arguments of the

revenue. Further even assuming that the period following ON period was a standby arrangement and not a Rest period, we find that the assessee had to undergo training during the said period. It is important to note that the work on the oil rigs is hazardous. The assessee had to remain fit during the rest period. Hence he had to undergo demonstrations and training but all that has a nexus with the services which he had to render in India. Hence the payment which he received was for his services in India. In this connection it may be noted that the Explanation to section 9(1)(ii) introduced by Finance Act of 1983 refers to what constitutes "income earned in India". This Explanation was introduced by Finance Act of 1983 w.e.f. 1.4.1979 to get over the judgment of the Gujarat High Court in 124-ITR-391 in which it was held that in order to attract section 9(1)(ii) of the Act, liability to pay must arise in India. By the said Explanation, the original intention u/s 9(1)(ii) has been revived. It explains the expression "income earned in India" to mean payment for the services in India even if the contract is executed outside India or amount is payable outside India. However, from the said Explanation it is not possible to infer the corollary viz that in all cases where services are rendered outside India, the salary cannot be deemed to accrue in India, ipso facto. In certain cases, even if the services were rendered outside India, the income can still accrue or arise in India. It would depend on facts, of each case. In this case even assuming that there was no rest period as alleged by the assessee and that payment was for stand by, we are of the view that training abroad during this period was directly connected with the work on the rigs in India. It made the Assessee mentally and physically fit. Therefore the payment of salary for OFF period was income earned in India i.e. for services rendered in India u/s 9(1)(ii). We would like to point out that in this case the assessment records show that from the income of the Indian operations the salary in its entirety

(including salary for the off period) has been paid by the employer Company. This conduct shows the intention of the contracting parties. Hence the entire salary for both the periods was taxable in India u/s 9(1)(ii).

9. The reasoning regarding question No. 2 is as under:

In this case, assessee had to work on the rig. It was hazardous, arduous and continuous. Under such circumstances free food and beverages is a necessity. It is not a luxury. It is not a perquisite. Its value cannot be added to the income of the assessee.

10. The reasoning regarding question No. 3 is as under:

It is important to note that section 234B imposes interest, which is compensatory in nature and not as a penalty (See Union Home Products Vs Union of India reported in 215-ITR-758 at page 766). Secondly, although section 191 of the Act is not over-ridden by section 192, 208 & 209(1)(a)(d) of the Act, the scheme of sections 208 & 209 of the Act indicates that in order to compute advance tax the assessee has to interalia estimate his current income and calculate the tax on such income by applying the rates in force. That u/s 209(1)(d) the income-tax calculated is to be reduced by the amount of tax which would be deductible at source or collectible at source, which in this case has not been done by the employer company according to the law prevailing for which the assessee cannot be faulted. As stated above at the relevant time there were conflicting decisions of the Tribunal. A bonafide dispute was pending. The assessee had to estimate his current income. The words used u/s 209(1)(a) makes the Assessee estimate his current income and since a bonafide dispute was pending, imposition of interest u/s 234B was not justified without hearing and without reasons. Accordingly, we answer this question in

the affirmative i.e. in favour of the assessee and against the department.

11. For the reasons aforesaid, we answer the first question in the negative i.e. in favour of the department and against the assessee and the other two questions are answered in the affirmative i.e. in favour of the assessee and against the department.

12. Appeal disposed of accordingly. No order as to costs.

(P.C. Pant, J.) **(P.C. Verma, A.C.J.)**

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